

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

KEVIN CLARKE, TREVOR BOECKMANN,
HARRY CRANE, CORWIN SMIDT,
PREDICT IT, INC., ARISTOTLE
INTERNATIONAL, INC., MICHAEL
BEELER, MARK BORGHI, RICHARD
HANANIA, JAMES D. MILLER, JOSIAH
NEELEY, GRANT SCHNEIDER, and WES
SHEPHERD

No. 1:22-CV-00909-LY

The Honorable Lee Yeakel

Plaintiffs,

V.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

PLAINTIFFS' NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiffs, by counsel, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Court's constructive denial of Plaintiffs' Motion for Preliminary Injunction [ECF No. 12] filed on September 30, 2022, including its orders giving priority to and referring certain other motions to the Magistrate judge for decision. ECF Nos. 14, 22.

A motion for preliminary injunction is constructively denied for the purposes of 28 U.S.C. § 1292(a)(1) “when a court declines to make a formal ruling on a motion for a preliminary injunction, but its action has the effect of denying the requested relief.” 11A Wright & Miller, Federal Practice and Procedure § 2962 (3d ed.); see *McCoy v. La. State Bd. of Ed.*, 332 F.2d 915,

916–17 (5th Cir. 1964) (taking action that would delay consideration of preliminary injunction regarding school session until after that session had “the practical effect” of denying the injunction); *U.S. v. Lynd*, 301 F.2d 818, 822 (5th Cir. 1962) (holding that declining to rule on motion for temporary injunction was “in all respects a ‘refusal’” sufficient for interlocutory appeal); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1449–50 (9th Cir. 1992) (holding that the district court’s delaying a hearing on a motion for preliminary injunction to stop construction of an astrophysical complex until after an access road had been constructed “effectively denied the motion” and gave the Court jurisdiction to hear the appeal); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1161 (4th Cir. 1977) (holding that indefinite continuance of hearing on injunction “amounted to the refusing of an injunction and [wa]s appealable as such”); *see also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 612 (6th Cir. 2020) (holding that district court’s denial of a temporary restraining order also effectively denied a motion for preliminary injunction because the district court showed no indication of ruling on that motion expeditiously and the case would become moot in three weeks).

The Court has effectively denied Plaintiffs’ Motion for Preliminary Injunction. Plaintiffs filed the Motion on September 30. ECF No. 12. It asks the Court to enjoin enforcement of a Commission mandate to end trading of and liquidate all PredictIt Market contracts by 11:59pm on February 15, 2023, pending resolution of the merits. *Id.* at 2. The Motion was fully briefed over two months ago on October 20. *See* ECF No. 18. On November 18, Plaintiffs moved to expedite consideration of the motion so that it would be decided by Christmas, in light of detailed and accelerating irreparable harms in December. ECF No. 23, at 2–4. The motion informed the Court that, in the absence of a process to decide the motion by Christmas, it would regard the motion as effectively denied. *Id.* at 6. As of this date, the Court has neither scheduled a hearing on nor taken

any action on the request for a preliminary injunction. Under Fifth Circuit precedent, the Court's failure to act has effectively denied the motion for preliminary injunction. Plaintiffs now notice this appeal of that effective denial.

Dated: December 23, 2022

Respectfully submitted,

By: /s/ Michael J. Edney
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CERTIFICATE OF SERVICE

On December 23, 2022, I filed this document with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to counsel of record for all parties.

/s/ Michael J. Edney
Michael J. Edney